Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THOMAS ROBERSON, III.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

Petition For A Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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1988

QUESTIONS PRESENTED

1. **WHETHER A WAIVER OF THE RIGHT TO APPEAL A SENTENCE WHICH PRECLUDES THE APPEAL OF ANYTHING BUT AN "UPWARD DEPARTURE" WAIVES THE APPEAL OF AN ILLEGAL SENTENCE.**

2. **WHETHERTHE FIFTH CIRCUITS ORDER DISMISSING PETITIONER'S APPEAL IS IN CONFLICT WITH UNITED STATES v. ROSA, 123 F 3d. 94 (2nd CiR. 1997).**

3. **WHETHER THE WAIVER OF APPEAL PROVISION CONTAINED IN PETITIONERS PLEA AGREEMENT IS AN UNENFORCEABLE CONTRACT AND VOID AGAINST PUBLIC POLICY.**

LIST OF ALL PARTIES

1. Thomas Roberson, III

2. Chris Flood

3. United States of America

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JURISDICTION

The order of the Court below dismissing Petitioner's Appeal was entered August 25, 1997. (Appendix A). This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgement on petition for certiorari rests upon 28 U.S.C. §1254(1) and Supreme Court Rule 10.

STATEMENT OF THE CASE

Petitioner was charged with Counts One, Three and Four of a five count Superseding Indictment with conspiracy to possess with intent to distribute cocaine and cocaine base in violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §846, possessing with intent to distribute cocaine base on or about December 10, 1994, in violation of Title 21 §841(a)(1), and with possessing with intent to distribute on or about June 13, 1995, cocaine base in violation of Title 21 U.S.C. §841(a)(1). (I R. 137-141).

Petitioner pled guilty to Count Four of the Superseding Indictment on March 27, 1996, and the United States dismissed Counts One and Three after sentencing. (V R. 3-50).

On October 10, 1996, Petitioner was sentenced to 188 months in the custody of the Bureau of Prisons and a fine of $25,000.00. The District Court illegally increased petitioner's offense level by four points for being an organizer, leader pursuant toU.S.S.G. §3B1.1 and an additional two levels for a co-conspirators possession of a dangerous weapon pursuant to U.S.S.G. §5K2.6.

Petitioner thereafter timely filed notice of appeal on October 16, 1996. (II R. 268-269).

On July 8, 1997 Respondent filed a Motion to Dismiss Petitioner's appeal claiming Petitioner had waived his right to appeal.

On July 21, 1997 Petitioner filed a Response to Respondent's Motion to Dismiss.

Petitioner's appeal was dismissed on August 25, 1997. (Attachment A)

ARGUMENT

A. PETITIONERS HAS THE RIGHT TO APPEAL HIS SENTENCE BECAUSE HIS ILLEGAL SENTENCE WAS IN EFFECT AN UPWARD DEPARTURE.

Petitioner's plea agreement states in pertinent part:

> Defendant is aware that his sentence will be imposed in conformity with the Federal Sentencing Guidelines and Policy Statements... By entering into this agreement, Defendant voluntarily and knowingly waives his right to contest his sentence in any post-conviction proceeding, including but not limited to any appeal right conferred by 18 U.S.C. §3742 or to a proceeding pursuant to 28 U.S.C. §2255, provided, however, that this waiver does not extend to his right to appeal any upward departure pursuant to U.S.S.G. §5K2.0 from the Guideline range found by the district court, to his right to appeal a failure of the Court to grant the United States' motion for downward departure, or to his right to challenge his sentence to the extent that it is the result of a violation of his constitutional rights based on claims of ineffective assistance of counsel or prosecutorial misconduct of constitutional dimension.

The right of an accused to appeal is a statutory not Constitutional right. *Abney v. United States*, 431 U.S. 651, 656, 97 S.Ct. 2034, 2038, 52 L.Ed.2d 651 (1977). The right to appeal a criminal

sentence is conferred by 18 U.S.C. § 3742. This right may be waived if done knowingly, voluntarily and intelligently. *United States v. Zink*, 107 F.3d 716, 717 (9th Cir. 1997); *United States v. Bushert*, 997 F.2d 1343 (11th Cir. 1993), *cert denied*, -- U.S. --, 115 S.Ct. 652, 130 L.Ed.2d 556 (1994); *United States v. Rutan*, 956 F.2d 827 (8th Cir. 1992); *United States v. Wiggins*, 905 F.2d 51 (4th Cir. 1990). When these conditions are met and the appeal waiver is signed it will be binding. *United States v. Price*, 95 F.3d 364, 369 (5th Cir. 1996). However, the waiver must be construed against the government. *United States v. Somner* No. 96-20989, (5th Cr. October 28,1997), citing *United States v. Rosa*, 123 F.3d 94 (2nd Cir. 1997) citing *United States v. Ready*, 83 F.3d 551, 556 (2nd Cir. 1996).

Because the waiver must be construed against the government, the attempt by the government to limit Petitioner's appeal rights to a "formal" "upward departure" must fail. The Fifth Circuit in *United States v. Kelly*, 974 F.2d 22 (5th Cir. 1992) refused to enforce a waiver provision in a similar case where the defendant had waived everything but an "upward departure." In *Kelly* the Fifth Circuit concluded that the trial court illegally sentenced defendant to a greater supervisory release term than statutorily allowed resulting in "some form of 'upward departure.'" *Kelly*, 974 F.2d at 24. Here we have a very similar situation where the District Court's six level increase above the appropriate guideline range amounted to "some form of 'upward departure.'" The Fifth Circuit panel should have followed the holding in *Kelly* and not bound Petitioner to his waiver of appeal. Petitioner's right to appeal cannot rest solely upon whether the sentencing court uses the magic words "upward departure." The Second Circuit in *Rosa* took this argument to its logical conclusion:

> A sentencing court could, in theory, sentence to a life term [or simply beyond the statutory maximum] a defendant who had signed a plea which anticipated only a few months of imprisonment, and that defendant, under the terms of this agreement, would have no right

to appeal even if the sentence were made erroneously. 123 F.3d at 100.

B. THE DISMISSAL OF PETITIONER'S APPEAL IS IN CONFLICT WITH UNITED STATES v. ROSA, 123 F3D. 94 (2ND CIR. 1997) BECAUSE PRTITIONERS WAIVER OF HIS RIGHT TO APPEAL HIS WAS NOT DONE KNOWINGLY AND INTELLIGENTLY.

As was mentioned above a plea agreement waiver of a right to appeal must be made voluntarily, and intelligently. *Zink*, 107 F.3d at 717. Some courts question whether a plea sentence waiver of appeal rights can be made with knowledge or intelligence at all. As District Judge Parker stated in his concurrence in *United States v. Melancon*,:

> I do not think that a defendant can ever knowingly and intelligently waive, as part of a plea agreement, the right to appeal a sentence that has yet to be imposed at the time he or she enters into the plea agreement; such a "waiver" is inherently uninformed and unintelligent. 972 F.2d 566, 571 (5th Cir. 1992).

The Second Circuit has particular concern in the "unusual" plea agreement entered into by Petitioner where there is no agreed upon sentencing range. The Second Circuit in *Rosa* stated:

> The standard agreement allows him [Petitioner], in advance, to evaluate the predicted range and assess in an informed manner whether he is willing to accept the risk that he will receive a sentence in the upper part of the range and be unable to appeal. There is a direct connection between the predicted range and the right to appeal. Under the unusual agreement drafted by the United States Attorney for the Eastern District, however, the defendant assumes a virtually unbounded

> risk of error or abuse by the sentencing court. He is not able to rely upon the predicted range for any guaranteed point at which his right to appeal will be retained. 123 F.3d at 99.

The Second Circuit found this of particular concern when viewed in light of the "relevant conduct" provision in the Sentencing Guidelines as well as the ability of a defendant to be sentenced to more time for the actions of a co-defendant which is precisely what happened to Petitioner. Petitioner did not knowingly and voluntarily waive his right to appeal because he did not know enough about his sentence to do so.

C. THE APPEAL WAIVER IN PETITIONERS PLEA AGREEMENT IS AN UNENFORCEABLE CONTRACT AND VOID AGAINST PUBLIC POLICY.

Plea agreements should be analyzed and enforced using the principles of contract law. *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995). However plea agreement contracts should be analyzed keeping in mind "special due process concerns for fairness and the adequacy of procedural safeguards." *Ready*, 82 F.3d at 558 *citing*, *Carnine v. United States*, 974 F.2d 924, 928 (7th Cir. 1992). Petitioner's agreement says that his sentence will be imposed "in conformity with the...Guidelines" and then it takes away his right to appeal if it is not. In this case the United States breached the terms of the contract by the District Court not sentencing Petitioner in conformity with the Guidelines, and now, the Fifth Circuit Panel has said that he has no right to appeal such a breach. Surely this type of contract analysis cannot meet the test of "special due process concerns for fairness." It is anything but fair to enforce this contract against Petitioner because not only was he in a bad bargaining position but the length of the sentence was unknown and according to the terms he had no remedy in the event of a breach.

Petitioner's waiver of his appeal in his plea agreement is void as against public policy. In *Rosa* the Second Circuit said it would not restrict parties' ability to enter into plea agreements so long as the agreement does not result in a "serious detriment to important public or private interest..." *Rosa*, 123 F.3d at 97. The enforcement of the appeal waiver in Petitioner's plea agreement would result in a "serious detriment" not only to Petitioner's private interest in freedom but also to the public interest in fair and accurate sentencing.

CONCLUSION

The Order dismissing Petitioner's Appeal was improper. It is an important question of Federal law when, and to what extent, a plea agreement waiver of appeal will be upheld. The petition should be granted.

Respectfully submitted,

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH COURT

No. 96-50895

U.S. COURT OF APPEALS
FILED
AUG 25 1997
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA
Plaintiff - Appellee
v.

THOMAS ROBERSON, III
Defendant - Appellant

Appeal from the United States District Court for the
Western District of Texas, Austin

Before HIGGINBOTHAM, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion to dismiss theappeal is GRANTED.

IT IS FURTHER ORDERED that appellee's motion for an extension of time to and including 14 days after the court's ruling on the motion to dismiss, in the event same denied, is DENIED as moot.

MOT-21

[Petitioner's copy was received without a second page]

APPENDIX "B"
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION
UNITED STATES OF AMERICA

v.

CRIMINAL NO.
A-95-CR-098(1)
(JN THOMAS ROBERSON, JR.)

PLEA AGREEMENT

Defendant will plead guilty to Count Four of the Superseding Indictment.

After sentencing, the United States will dismiss Counts One, Two, Three, and Five of the Superseding Indictment, as to this defendant.

The United States will not institute any further criminal charges against Defendant concerning conduct which is the subject of this investigation.

Defendant will give a complete and truthful statement to law enforcement authorities concerning his knowledge of drug trafficking. Any subsequent prosecutions against

Defendant by the United States shall not be based upon statements or testimony of Defendant which is derived from this agreement except that statements of Defendant and evidence derived therefrom may be used in cross-examination, in rebuttal in any proceeding, or for the prosecution of Defendant for perjury, making false statements, or obstruction of justice. Section 1B1.8 of the Sentencing Guidelines will apply. Information provided by Defendant will not be used to increase the guideline range.

If Defendant testifies in the trial of this cause, the United States Attorney will file a motion recommending a downward departure of three levels. If this case is resolved without a trial, the United States Attorney will make such a motion for a downward departure of three levels. If this case goes to trial and Defendant is ready and wiling to testify but is not called by the United States, the United States Attorney will still move for a downward departure of three levels. Defendant further understands that, in the event the United States files a motion for a departure, the Court will determine the merits of the motion; the Court is not bound by such a motion and may overrule it. If the Court grants a motion for downward departure, the extent of the departure is exclusively in the discretion of the Court.

The United States Attorney represents to the Court that Defendant timely provided complete information to the government concerning his own involvement in the offense and timely notified the United States Attorney of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

Defendant is aware that his sentence will be imposed in conformity with the Federal Sentencing Guidelines and Policy Statements, may be up to the maximum allowed by statute for his offense, and is not subject to parole. By entering into this agreement, Defendant voluntarily and knowingly waives his right to contest his sentence in any post-conviction proceeding, including but not limited to any appeal right conferred by 18 U.S.C. § 3742 or to a proceeding pursuant to 28 U.S.C. § 2255, provided, however, that this waiver does not extend to his right to appeal any upward departure pursuant to U.S.S.G. § 5K2.0 from the Guideline range found by the district court, to his right to appeal a failure of the Court to grant the United States' motion for downward departure, or to his right to challenge his sentence to the extent that it is the result of a violation of his constitutional rights based on claims of ineffective assistance of counsel or prosecutorial misconduct of constitutional dimension.

Defendant has tendered $50.00 to the United States Attorney for payment of the mandatory special assessment.

There are no other terms or conditions of this plea agreement.

JAMES H. DeATLEY
UNITED STATES ATTORNEY

By:[sig]
KELLY LOVING
Assistant U.S. Attorney

[sig]
THOMAS ROBERSONDate: 2/16/96
Defendant

[sig]
CHRIS FLOODDate: 2-16-96
Attorney for Defendant

Supreme Court, U.S.
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No. 97-872

In the Supreme Court of the United States

OCTOBER TERM, 1997

THOMAS ROBERSON, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the court of appeals correctly enforced petitioner's knowing and voluntary waiver, in his plea agreement, of the right to appeal his sentence.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-872

THOMAS ROBERSON, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1997. A petition for a writ of certiorari was filed on November 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of one count of possession of cocaine base with intent to distribute it, in violation

of 21 U.S.C. 841(a)(1). He was sentenced to 188 months' imprisonment, to be followed by five years' supervised release. 10/10/96 Sent. Tr. 32. The court of appeals dismissed his appeal. Pet. App. 1a-2a.

1. In late 1994, law enforcement authorities in Texas received information about a large-scale cocaine trafficking organization headed by petitioner. In June 1995, officers conducted surveillance of an apartment where petitioner and his associates were reportedly converting powdered cocaine into "crack" cocaine. When the officers entered the apartment to execute a search warrant, petitioner grabbed a brown paper sack and fled through a rear window. He was arrested in the woods near the apartment complex. Presentence Investigation Report (PSR) at ¶¶ 4-8, 10-11.

A search of the apartment resulted in the seizure of cocaine base, powdered cocaine, scales, approximately $20,000 in cash, and a loaded .38 Lorcin semi-automatic pistol. PSR at ¶ 12. The following day, officers searched the woods into which petitioner had fled and located a brown paper sack in which were a large number of baggies containing crack cocaine. *Id.* at ¶ 15. A search of the car of one of petitioner's associates resulted in another large seizure of crack cocaine, *id.* at ¶ 16, and officers additionally seized a loaded 9mm Baretta pistol from underneath the driver's seat of another co-conspirator's car. *Id.* at ¶ 13.

By superseding indictment, petitioner was charged with two counts of possession of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of conspiracy to distribute the same, in violation of 21 U.S.C. 846. He pleaded guilty to one count of possession with intent to distribute.

In exchange, the government agreed to dismiss the remaining counts after sentencing, and also agreed not to institute any further criminal charges relating to its investigation of petitioner's conduct. Pet. App. 3a.

In the plea agreement, petitioner expressly waived his right to appeal his sentence, either on direct appeal or in a post-conviction proceeding:

> [Petitioner] is aware that his sentence will be imposed in conformity with the *Federal Sentencing Guidelines and Policy Statements*, may be up to the maximum allowed by statute for his offense, and is not subject to parole. By entering into this agreement, [petitioner] voluntarily and knowingly waives his right to contest his sentence in any post-conviction proceeding, including but not limited to any appeal right conferred by 18 U.S.C. § 3742 * * *, provided, however, that this waiver does not extend to his right to appeal any upward departure pursuant to U.S.S.G. § 5K2.0 from the Guideline range found by the district court * * *.

Pet. App. 5a.[1]

Petitioner's waiver of his appellate rights was the subject of several specific exchanges with the district court at the plea hearing:

> THE COURT: * * * [A]s part of your plea agreement, if it's accepted by the court, you're

---

[1] Petitioner also reserved the right to appeal a denial of a motion by the United States for a downward departure, and to challenge the sentence on grounds of ineffective assistance of counsel or prosecutorial misconduct. Pet. App. 5a. The petition raises no issue as to those provisions of the agreement.

providing that you will waive or give up some of the limited rights to appeal a sentence that's imposed by this court in your case. Each of you understand that?[2]

MR. ROBERSON: Yes, Your Honor.

3/27/96 Plea Tr. 19.

THE COURT: And have each of you had an opportunity to talk with your lawyer prior to being here today about that—about whether or not you should or should not give up some of those rights to appeal?

MR. ROBERSON: Yes, Your Honor.

* * *

THE COURT: And each of you understands what you're doing?

MR. ROBERSON: Yes, Your Honor.

* * *

THE COURT: And that's what you want to do, is that correct?

MR. ROBERSON: Yes, Your Honor.

Id. at 20.

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[2] Four of petitioner's co-conspirators also pleaded guilty at the same plea hearing.

> THE COURT: * * * Section 3742(a)(1), sets out your appeal rights. * * * And as we have talked about several times, you have in your plea agreement agreed with the government, if that agreement is accepted, to waive or give up some of those rights to appeal.

Id. at 43.

The plea agreement, containing the waiver of appellate rights provision, was read aloud at the hearing, 3/27/96 Plea Tr. 13, and petitioner confirmed that he understood it, *id.* at 14. The waiver was also specifically noted in his presentence report. PSR at ¶ 3. The district court accepted petitioner's plea as knowing and voluntary. 3/27/96 Plea Tr. 47.

2. Petitioner's presentence report assigned him a base offense level of 36, based on a drug quantity of 1,400.52 net grams of cocaine base and 127.43 net grams of powdered cocaine. PSR at ¶ 25. Petitioner did not contest the base offense level. Add. to PSR at 1A. The PSR recommended a two-level adjustment for the possession of a dangerous weapon by one of petitioner's co-defendants under Guidelines § 2D1.1(b)(1) and a four-level adjustment under Guidelines § 3B1.1 because petitioner was the organizer and leader of criminal activity involving five or more participants. PSR at ¶¶ 26-28. It subtracted three levels for acceptance of responsibility, pursuant to Guidelines § 3E1.1. *Id.* at ¶ 22-23. The PSR thus calculated petitioner's adjusted offense level to be 39, resulting in a Guidelines range of 262-327 months' imprisonment. *Id.* at ¶ 58. It found no factors warranting either an upward or downward departure. *Id.* at ¶ 71.

At sentencing, petitioner objected to the adjustments for his co-defendant's firearm possession and his role in the offense. The government argued on behalf of the adjustments and also moved under Guidelines § 5K1.1 for a downward departure of three levels because of petitioner's substantial assistance. The court accepted the adjustments, granted the downward departure, and set petitioner's adjusted offense level at 36, with a resultant range of 188-235 months' imprisonment. 10/10/96 Sent. Tr. 31. The court sentenced petitioner to 188 months' imprisonment. *Id.* at 32.

3. Petitioner appealed his sentence. The government moved to dismiss the appeal on the basis of petitioner's waiver of appellate rights. The government argued that the waiver was knowing and voluntary, and that the sentence conformed to the terms of the plea agreement. Gov't Motion to Dismiss 3. Petitioner, in response, argued that the adjustments under Guidelines §§ 2D1.1(b)(1) and 3B1.1 "should be considered to be upward departures" because "of the effect they had in substantially increasing the sentence." Response to Motion to Dismiss 2. Without opinion, the court of appeals granted the government's motion and dismissed the appeal. Pet. App. 1a-2a.

ARGUMENT

1. Petitioner contends (Pet. 3) that the district court's adjustments to his basic offense level under the Guidelines—for a co-defendant's possession of a dangerous weapon, and for being an organizer or leader of a criminal enterprise—amounted to an upward departure, which he retained the right to challenge on appeal. That argument is without merit.

An "adjustment" under the Guidelines is not an "upward departure." See Guidelines § 1B1.1 (application instructions, distinguishing between adjustments and departures). An adjustment to a defendant's base offense level is used to account for specific characteristics of the offense, the offender, or the victim. Along with the criminal history category, the adjusted offense level determines a defendant's applicable Guidelines range. By contrast, a departure under Guidelines § 5K2.0 is a deviation from the applicable Guidelines range, granted in cases that fall outside the "heartland" of those contemplated by the Guidelines. See *Koon* v. *United States*, 116 S. Ct. 2035, 2042, 2044 (1996); 18 U.S.C. 3553(b).

In this case, the PSR subtracted three levels from petitioner's base offense level for his acceptance of responsibility (Guidelines § 3E1.1), and added six levels because of a co-defendant's possession of a firearm (§ 2D1.1(b)(1)) and because of petitioner's leadership role in criminal activity involving five or more participants (§ 3B1.1). Those steps were adjustments to produce a Guidelines range, not departures from it. And once the court had arrived at an adjusted offense level of 39, resulting in a range of 262-327 months' imprisonment, the court did not depart upwards. To the contrary, it granted petitioner a *downward* departure based on his substantial assistance to the government pursuant to Guidelines § 5K1.1. The court then sentenced petitioner to 188 months' imprisonment, the lowest sentence within the revised 188-235 month range.

In his plea agreement, petitioner reserved the right to appeal "any upward departure pursuant to U.S.S.G. § 5K2.0 from the Guideline range found by the district court." Pet. App. 5a. Because the district court did

not depart upward from the range it determined to be applicable, petitioner's sentence fell squarely within the terms of the waiver provision in his agreement. His appeal was therefore properly dismissed. "In no circumstances . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless." *United States* v. *Yemitan*, 70 F.3d 746, 747 (2d Cir. 1995); see also *United States* v. *Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990) ("a defendant who pleads guilty, and expressly waives the statutory right to raise objections to a sentence, may not then seek to appeal the very sentence which itself was part of the agreement").

Properly understood, petitioner's challenge to his sentence is that the district court misapplied the Guidelines in determining the applicable range (although he fails to specify exactly what, in his view, the district court did wrong). As the courts of appeals have consistently recognized, however, an appeal waiver precludes review of an alleged misapplication of the Guidelines. See *United States* v. *Price*, 95 F.3d 364, 369 (5th Cir. 1996); *Yemitan*, 70 F.3d at 748; *United States* v. *Schmidt*, 47 F.3d 188, 192 (7th Cir. 1995); *United States* v. *Ashe*, 47 F.3d 770, 776 (6th Cir.), cert. denied, 516 U.S. 859 (1995); *United States* v. *Marin*, 961 F.2d 493, 496 (4th Cir. 1992); *United States* v. *Rutan*, 956 F.2d 827, 828 (8th Cir. 1992); *United States* v. *Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991). As the Seventh Circuit noted in explaining the dismissal of an appeal similar to petitioner's:

> Defendants who appeal from sentences following plea agreements always point to unanticipated and unwelcome developments. If they had anticipated (which is to say, consented to) these developments, they would not be grounds of complaint. * * * To say that a waiver of appeal is effective if and only if the defendant lacks grounds for appeal is to say that waivers will not be honored.

United States v. *Wenger*, 58 F.3d 280, 282, cert. denied, 516 U.S. 936 (1995).

2. Contrary to petitioner's contention (Pet. 3-5), *United States* v. *Rosa*, 123 F.3d 94 (2d Cir. 1997), is fully consistent with the court of appeals' summary disposition of this case. *Rosa* involved a plea agreement containing a specific estimate of the defendant's likely Guidelines range. The sentencing court, however, calculated the applicable range quite differently, and imposed a sentence harsher than that contemplated by the agreement. 123 F.3d at 96-97. Even so, the Second Circuit enforced the defendant's waiver of appellate rights. That decision accords with the judgment below. Indeed, the court noted that "plea agreements can have extremely valuable benefits to both sides," and that "the waiver provision is a very important part of the agreement." *Id.* at 97.

Petitioner nonetheless cites dicta in *Rosa* expressing concern about the waiver-of-appellate-rights provision presented there. Pet. 3-5. That concern, however, focused on the potential for unfairness where a plea agreement anticipates a certain sentence that is significantly more lenient than the sentence ultimately imposed by the district court. 123 F.3d at 100. No such potential for unfairness existed here, be-

cause the plea agreement did not anticipate any particular Guidelines sentence; to the contrary, it provided that petitioner's term of imprisonment "may be up to the maximum allowed by statute for his offense." Pet. App. 5a.[3]

3. Petitioner also argues (Pet. 4-5) that his waiver of appellate rights was, by definition, unknowing and involuntary because his actual sentence was unknown to him at the time that he executed the waiver. The courts of appeals have consistently rejected such claims, however, reasoning that, although defendants may not know the exact contours of their prospective sentences, they do know that they have a right to appeal the sentence and that they are relinquishing the right. Such knowledge renders the waiver knowing and intelligent. See *Rutan*, 956 F.2d at 830; *United States* v. *Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992); see also *United States* v. *Baty*, 980 F.2d 977, 979 (5th Cir. 1992) (when defendant waives right to appeal, she gives up right to "correct a district court's unknown and unannounced sentence"), cert. denied, 508 U.S. 956 (1993); *Wiggins*, 905 F.2d at 53. As the Eighth Circuit has noted, petitioner's argument—that one

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[3] Despite petitioner's suggestion to the contrary (Pet. 3), the Fifth Circuit's dismissal of his appeal is also consistent with that court's own earlier decision in *United States* v. *Kelly*, 974 F.2d 22 (1992). In *Kelly*, the court refused to enforce a waiver of appellate rights because the defendant had been sentenced to a term of supervised release exceeding the statutory maximum. *Id.* at 23-24. This case, however, does not present that issue. Petitioner's 188-month sentence was at the bottom end of the applicable Guidelines range (which itself was the result of a downward departure), and was well below the statutory maximum of life imprisonment. See 21 U.S.C. 841(b)(1)(A).

cannot knowingly and voluntarily waive an unknown right—could be said of waivers generally: "[a]n accused does not know that the government will be able to prove its case, how witnesses will testify, or that he will be able to competently represent himself, yet he may freely waive his rights to jury trial, to confront witnesses, and to counsel." *Rutan*, 956 F.2d at 830 n.2.

Moreover, petitioner's waiver of appellate rights was entirely knowing and voluntary. At his plea hearing, petitioner was told that his crime carried a maximum possible penalty of life imprisonment. 3/27/96 Plea Tr. 37-38. He was told that he would be sentenced at a later date, after the court had reviewed a presentence investigative report, *id.* at 33, and under the Sentencing Guidelines, *id.* at 41-42. Petitioner confirmed that he understood the sentencing scheme, *id.* at 43, and attested that no prediction or promise had been made to him regarding his prospective sentence, *id.* at 46. He repeatedly confirmed his waiver of appellate rights. *Id.* at 19-20. Petitioner—who had graduated from high school in the top 10% of his class, and who had attended the University of Texas, PSR at ¶ 50—understood the rights that he was waiving and the sentencing risks that he was assuming.

Finally, petitioner argues that his waiver of appellate rights should be invalidated as contrary to public policy. That argument is without merit. In plea bargaining, a defendant often agrees to waive important constitutional and statutory rights, see *United States* v. *Mezzanatto*, 513 U.S. 196, 200-203 (1995); *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), and this Court has recognized that plea bargaining is a valid—indeed vital—component of the criminal

justice system. See *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977). Consistent with those principles, the courts of appeals have consistently enforced voluntary and knowing waivers of the right to appeal a sentence.[4] In so doing, they have reaffirmed that public policy concerns favor negotiated waivers in plea agreements:

> [I]f the prosecutor is interested in 'buying' the reliability assurance that accompanies a waiver agreement, then precluding waiver can only stifle the market for plea bargains. A defendant can 'maximize' what he has to 'sell' only if he is permitted to offer what the prosecutor is most interested in buying.

Mezzanatto, 513 U.S. at 208 (permitting defendant to waive protection of Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6) as part of plea agreement); see also *United States* v. *Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996), cert. denied, 117 S. Ct. 1282 (1997); *United States* v. *Wenger*, 58 F.3d at 282; *Navarro-Botello*, 912 F.2d at 321-322 & n.3; *Wiggins*, 905 F.2d at 54.

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[4] See, *e.g.*, *United States* v. *Buchanan*, 131 F.3d 1005, 1008-1009 (11th Cir. 1997); *United States* v. *Woolley*, 123 F.3d 627, 631 (7th Cir. 1997); *Ashe*, 47 F.3d at 776; *United States* v. *DeSantiago-Martinez*, 38 F.3d 394, 395 (9th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); *United States* v. *Salcido-Contreras*, 990 F.2d 51, 52 (2d Cir.), cert. denied, 509 U.S. 931 (1993); *United States* v. *Melancon*, 972 F.2d 566, 567-568 (5th Cir. 1992); *Marin*, 961 F.2d at 496; *Rutan*, 956 F.2d at 829-830.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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